vote of the delegate in the convention.

(j) A person elected to the office of delegate to a convention shall not accept or receive any money or other valuable consideration for his or her vote as a delegate.

(k) A person shall not, while the polls are open on an election day, solicit votes in a polling place or within 100 feet from an entrance to the building in which a polling place is located.

(l) A person shall not keep a room or building for the purpose, in whole or in part, of recording or registering bets or wagers, or of selling pools upon the result of a political nomination, appointment, or election. A person shall not wager property, money, or thing of value, or be the custodian of money, property, or thing of value, staked, wagered, or pledged upon the result of a political nomination, appointment, or election.

(m) A person shall not participate in a meeting or a portion of a meeting of more than 2 persons, other than the person's immediate family, at which an absent voter ballot is voted.

(n) A person, other than an authorized election official, shall not, either directly or indirectly, give, lend, or promise any valuable consideration to or for a person to induce that person to both distribute absent voter ballot applications to voters and receive signed absent voter ballot applications from voters for delivery to the appropriate clerk.

(2) A person who violates a provision of this act for which a penalty is not otherwise specifically provided in this act, is guilty of a misdemeanor

(3) A person or a person's agent who knowingly makes, publishes, disseminates, circulates, or places before the public, or knowingly causes directly or indirectly to be made, published, disseminated, circulated, or placed before the public, in this state, either orally or in writing, an assertion, representation, or statement of fact concerning a candidate for public office at an election in this state, that is false, deceptive, scurrilous, or malicious, without the true name of the author being subscribed to the assertion, representation, or statement if written, or announced if unwritten, is guilty of a misdemeanor.

(4) As used in this section, "valuable consideration" includes, but is not limited to, money, property, a gift, a prize

or chance for a prize, a fee, a loan, an office, a position, an appointment, or employment.

MCLA sec. 750.505; MSA 28.773 provides:

"Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court.

STATEMENT OF THE CASE

On October 19, 2001, Appellant wrote to Appellee requesting "that the records and documents associated with the November 2, 1999 election be made available for my inspection...." Reference in this letter was made to the position taken by the Michigan Department of Elections, to wit:

"In closing, it merits note that the records and documents associated with the election are on public record and available for your inspection at your request."

Correspondence from the Michigan Department of State of September 21, 2001

[APPENDIX E].

On October 31, 2001, Defendant wrote to Appellant, in part:

"Dear Mr. Korn:

The City of Southfield has received your request to inspect and copy public records associated with the November 2, 1999 election. Specifically, you stated:

I am particularly interested in all absentee ballots, which were cast in that election; the ones, which were counted; and the ones that were not counted. In addition, I would like to review all records and data associated with the conduct of this election by your office. What applications for absentee ballots went out? What requests for absentee ballots came back? What absentee ballots went out? What absentee ballots came back?

Your request to inspect and copy public records has been carefully reviewed. Please be advised that your request is denied.

Many of the records that you requested to inspect do not exist...."

Sincerely,
Nancy L. M. Banks
Freedom of Information Coordinator
City of Southfield"

[APPENDIX F]

Mr. Willie Jenkins said no to the production of election materials. His "no" led to Count IV of the Second Amended Information:

COUNT IV
ELECTION LAW – FAILURE TO PERFORM A DUTY

One Willie Carl Jenkins, Sr., late of the County of Saginaw, State of Michigan, did, or about August 5, 1996, in the County of Saginaw, State of Michigan, willfully fail to perform a duty imposed upon him by section 168.760 of the Michigan election law by refusing to allow public inspection of the absentee voter ballot applications and / or lists at all reasonable hours; contrary to MCL 168.931(1)(h); MSA 6.1931 [168.9311M].

MISDEMEANOR: 90 days and / or $500.00

[See Appendix G].

The Southfield City Clerk's no remained firm for close to six (6) months without consequence. There would be no information forthcoming from this Clerk.

On November 2, 2001, Appellant filed a Complaint in the Circuit Court for the County of Oakland. On October 3, 2003, the Trial Court issued its ORDER AND OPINION dismissing the case. There was no Trial. There was no testimony. There was no production of any documents. [See Appendix D].

Whether or not the Southfield City Clerk destroyed the very ballots she was told not to destroy through the Trial Court's injunctive order is not known. Arguably, such an act might well constitute obstruction of justice. There was no evidentiary hearing conducted in the Trial Court. In the case of Willie Jenkins, supra, an attempt to create a document during the Grand Jury proceedings, led to his being charged with Obstruction of Justice and Conspiracy:

COUNT I
OBSTRUCTION OF JUSTICE

One Willie Carl Jenkins, Sr. late of the County of Saginaw, State of Michigan, did, on October 31, 1996, in the County of Saginaw, State of Michigan, commit the crime of Obstruction of Justice by knowingly participating in fabricating false, inaccurate or mislead-

ing evidence material to a grand jury investigation, to wit: by creating or assisting in creating a certificate of oath of office, dated July 9, 1996, reflecting the appointment of Robert Woods as deputy registrar/elections officer when such positions did not exist under Michigan law, after the grand jury requested to view said document, contrary to MCL 750.505; MSA 28.773 [750.505-A].

FELONY: 5 years and / or $10,000.00

COUNT II
CONSPIRACY

One Willie Carl Jenkins, Sr., late of the County of Saginaw, State of Michigan, did, on or about October 31, 1996, in the County of Saginaw, State of Michigan, unlawfully conspire, combine, confederate and agree together with Maxine C. King to commit an offense prohibited by law, to wit: obstruction of justice; contrary to MCL 750.157a; MSA 28.354(1) [750.505-A] [C].

FELONY: 5 years and / or $10,000.00

See [Appendix G].

On October 24, 2003, Appellant filed a Claim of Appeal. On November 7, 2003, Appellee filed a Claim of Cross Appeal. On July 27, 2004, the Court of Appeals issued its unpublished opinion affirming the decision of the Trial Court. [See Appendix C].

On February 28, 2005, the Michigan Supreme Court declined to review the lower Courts' decisions. On July 8, 2005, the Motion filed for Reconsideration was denied.
[See Appendix B and Appendix A].

This Petition for Certiorari is filed to challenge the unfair application of Michigan's Freedom of Information Law and Michigan's Election Law in the instant case involving a White American Female Clerk, as distinguished from the application of the same laws in the case involving Mr. Willie Jenkins, an African American Male Clerk. The Trial Court and the Michigan Court of Appeals never discussed the application of the State's laws in the case of Mr. Willie Jenkins, and their rationale for applying a different view in the instant case. The Michigan Supreme Court did not grant leave to appeal.

Mr. Willie Jenkins was sentenced to jail for ten (10) years for failing to produce certain records and for obstruction of justice. The Clerk in the instant case was not ordered to produce any records, nor was there an evidentiary hearing to determine if the absentee ballots under litigation were destroyed in violation of the lower court's injunctive ruling.

The application of our laws should not be based on race, sex, age, or ethnicity. The lower Court's findings that records were not requested and that there was a lack of progress in the case to justify the result is respectfully not supported by the facts. All records were requested. Twenty-three months passed without an evidentiary hearing or a Trial. This Clerk answered no questions under oath, never stood trial.

Our Courts should do its best to insure that interpretation of these laws are fair to all, regardless of race, sex, age, or ethnicity.

ARGUMENT FOR ALLOWANCE OF THE WRIT

Justice was swift for Mr. Willie Jenkins. He was charged, tried, convicted, sentenced to jail, incarcerated, and all election records were put forward in a process orchestrated with the cooperation of the Michigan State Police and the Michigan Department of Elections. Mr. Willie Jenkins was an African American Male Clerk from Buena Vista Township, who had refused to turn over requested records to the Michigan State Police, on the "purported advice" of his attorney.

Ms. Nancy Banks, Clerk for the City of Southfield, said "no" in an absolute manner, and she has never had to answer one question under oath, or produce one record. Whether Ms. Banks destroyed the absentee ballots in dispute in violation of the Trial Court's injunction or not will never be known, as there was no Trial, or evidentiary hearing conducted by the Trial Court after twenty-three months of waiting.

The African American Male Clerk is compelled to produce all records including unopened, uncounted absentee ballots. The White American Female Clerk is not compelled to produce any records.

The scales of justice should not provide "different" justice depending on race or sex. The scales of justice should not provide "different" justice depending on age or ethnicity.

Brown v. Board of Education, 347 US 483 (1954) did away with "separate but equal" considerations. The result in the case at bar is respectfully challenged. The result in the case at bar suggests the notion of "separate but unequal". Either interpretation would violate constitutional mandates, and particularly those set forth in the 14th Amendment to the United States Constitution:

> "All persons born or naturalized in the United States, And subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The lower Courts are silent as to why the records were produced, including the unopened, uncounted absentee ballots, in a process developed by the Michigan State Police and the Michigan Department of Elections, in the People v. Jenkins, 624 NW2d 457 (2000), and that the rules are different here.

The lower Courts are silent as to why Mr. Willie Jenkins went to jail for failing to produce election records and obstruction of justice, while the Clerk in the instant case was able to avoid the production of all documents, and avoid compulsory attendance at an evidentiary hearing or trial to determine if the subject matter of this litigation was destroyed by this Clerk in violation of the lower Court injunction prohibiting such destruction.

If the Clerk in the case at bar destroyed the particular absentee ballots at issue, arguably this would constitute "obstruction of justice" as defined in the Jenkins case, supra. In the instant case, there was never an evidentiary hearing conducted in the Trial Court to determine if the subject ballots had been destroyed, so as to "obstruct justice"

Justice was swift in the Jenkins case, supra. After twenty-three months in the Trial Court in the instant case, there was no Trial or evidentiary hearing of any kind. Respectfully, such dismissal is indicative of a backlog in the lower Court, and not a lack of

progress in the case. MCLA sec. 15.240 calls for "hearing and trial or for argument at the earliest practicable date and expedited in every way." No Trial or evidentiary hearing in twenty-three months is respectfully not "expedited."

Michigan's Election Law and Michigan's Freedom of Information needs this Court's review. There is no rationale for sending Mr. Jenkins to jail "for failure to perform a duty, and obstruction of justice," and to allow the Clerk in the instant case to receive a "pass" for her conduct.

The scales of justice should appear to be balanced in the application of the law. There is no rational basis, or compelling state interest in interpreting Michigan's Freedom of Information Law and Michigan's Election Law to send Willie Jenkins, (an African American Male) to jail, and produce all election materials, including unopened, uncounted absentee ballots; and to allow the Southfield City Clerk, (a White American Female) a pass from all obligations.

The lower Courts did not recognize People v. Jenkins, 624 NW2d 457 (2000), as worthy of consideration. This Petition for Writ of Certiorari should be allowed to address the fair application of Michigan's Election Law and Michigan's Freedom of Information Law, so that the public perception of these laws will not be that the double standards of justice are revisited.

ARGUMENT

The Michigan Appellate Court erred in affirming the Trial Court's dismissal of the instant action on Motion of Summary Disposition violates the 14th Amendment to the United States Constitution, contrary to Brown v. Board of Education, in applying Michigan's Election Law and Freedom of Information Law differently in the cases of two Michigan Clerks; ie. an African American Male Clerk, and a White American Female Clerk.

A. When the African American Male clerk refused to produce "public election records", the African American was charged, tried, convicted, and sent to jail for failing to produce such records. All records were ultimately produced.

When the White American Female Clerk refused to produce "public election records", the White American Female was given a pass from prosecution and incarceration; No records were ordered produced, and the case requesting such information was dismissed on Motion for Summary Disposition. This Clerk answered no questions and produced no records.

B. When the African American Male Clerk was thought to have "obstructed justice" in the election records case, the African American Male was charged, tried, convicted, and sent to jail for obstruction of justice.

When the White American Female Clerk allegedly reported to the State's Bureau of Elections that she had destroyed the very absentee ballots which were under injunctive order in this very litigation, the White Female Clerk avoided civil and criminal exposure as the Trial Court granted Summary Disposition to this Clerk, affirmed by Michigan's Court of Appeals. Although the White American Female Clerk may well have obstructed justice in the case at bar, the Trial Court and the Michigan Appellate Court failed to permit the slightest time for an evidentiary hearing.

C. When the Michigan Appellate Court chose to "set an example" of an African American Male Clerk for: a) failing to turn over public election records; and b) obstruction of justice; the rationale adopted by Michigan's Court of Appeals in People v. Willie Jenkins, was certain and firm.

When the Trial Court and Michigan's Appellate Courts chose "not to set an example" of a White American Female Clerk for: a) failing to turn over public election records; and b) obstruction of justice; the rationale adopted by Michigan's Court of Appeals in People v. Willie Jenkins, was ignored.

The Trial Court and the Michigan Court of Appeals failed to address the considerations addressed in People v. Jenkins 624 NW2d 457 (2000). The Courts in the instant case achieved a different

result by ignoring the Jenkins case, supra. There was a lot of discussion in the lower Courts about privacy, and what information could be produced; what information should not be produced. In the Jenkins case, supra, all information was produced without qualification, or hesitation. The process was orchestrated through the Michigan State Police and the State of Michigan Bureau of Election. In the Jenkins case, supra, obstruction of justice was acted upon. In the instant case, the suggestion that the subject absentee ballots were destroyed did not satisfy the Trial Court or the Michigan Court of Appeals that an evidentiary hearing would be in order.

The Trial Court determined that there was a "lack of progress" in the case, although there was twenty-three months of Trial Court delay and no evidentiary hearings or Trials conducted. The Court of Appeals determined that information was not requested from this Clerk which would be consistent with the Jenkins request, and yet, [Exhibit E] identifies the request for information as broad and inclusive.

Brown v. Board of Education, 347 US 483 (1954) did away with "separate but equal" considerations. The result in the case at bar is respectfully challenged. The result in the case at bar suggests the notion of "separate but unequal". Either interpretation would violate constitutional mandates, and particularly those set forth in the 14th Amendment to the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It makes no sense to this writer that an African American Male Clerk is charged, tried, convicted, sentenced to jail for ten years, serves eighteen months, and is ordered to turn over all election records for public inspection including the unopened, uncounted absentee ballots, arising from a prior election, and the views taken in

evidentiary hearing; from any consequence for refusing to turn over election records, and destroying many of the documents which were part of the public record of the election:

- Twenty-three months of delay in the Trial Court resulted in no Trial or evidentiary hearing in violation of the law requiring an expedited hearing.

MCLA sec. 15.240 sec. 10(5)

> "An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."

This Petition for Writ of Certiorari is brought to review the unfair application of Michigan's Freedom of Information Law and Michigan's Election Law. The People of the State of Michigan should have confidence that their laws are fairly applied and interpreted in a way, which comports with Due Process of Law and Equal Protection of the Law.

Respectfully, the records and information which were requested in the case at bar could have been easily provided in the like style and like manner as were the same records and information requested in the case of Buena Vista Township Clerk, Willie Jenkins.

If the Clerk in the case at bar destroyed the very subject of this litigation, she should have to answer for such obstruction to justice in the same fashion as Willie Jenkins. In 2005, our country should be beyond having rules for some, and different rules for others.

Respectfully, this Court should intercede.

In closing, welcome to the Bench, Judge Roberts, and congratulations on your appointment.

RELEIF

Appellant, respectfully prays that the Writ of Certiorari be ordered.

Respectfully submitted,

Stephen P. Korn
Appellant
Member of the Bar of the United States Supreme Court

Attorneys in the Lower Court

GARY R. SANFIELD
P-2798
Attorney for Appellant
Member of the Bar
of the State of Michigan

Honorable William Lucas
P-16840
Co-Counsel for Appellant
Member of the Bar of the
United States Supreme Court

APPENDIX A

DECISION OF THE MICHIGAN SUPREME COURT
DATED JULY 8, 2005

ORDER

Michigan Supreme Court
Lansing, Michigan

July 8, 2005

126818 & (69)

STEPHEN P. KORN
Plaintiff-Appellant,

V

SC: 126818
COA: 251827
Oakland CC: 2001-035929 CZ

SOUTHFIELD CITY CLERK
Defendant-Appellee.

_____/

On order of the Court, the motion for reconsideration of this Court's order of February 28, 2005 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 8, 2005

Corbin R. Davis

APPENDIX B

DECISION OF THE MICHIGAN SUPREME COURT
DATED FEBRUARY 28, 2005

ORDER

Michigan Supreme Court
Lansing, Michigan

February 28, 2005

126818 & (65)

STEPHEN P. KORN
Plaintiff-Appellant,

V

SC: 126818
COA: 251827
Oakland CC: 2001-035929 CZ

SOUTHFIELD CITY CLERK
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the July 27, 2004 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this court. The application for leave to appeal as cross-appellant is therefore moot and is denied.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 28, 2005

Corbin R. Davis

APPENDIX C

DECISION OF THE MICHIGAN COURT OF APPEALS
DATED
JULY 27, 2004

STATE OF MICHIGAN

MICHIGAN COURT OF APPEALS

STEPHEN P. KORN,

Plaintiff-Appellant/Cross-Appellee,

v

SOUTHFIELD CITY CLERK,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
July 27, 2004

No. 251827
Oakland Circuit Court
LC No. 2001-035929-CZ

Before: Griffin, P.J., and Cavananagh and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders denying his motions for trial and an order to show cause, and granting defendant's motion for confirmation of final order in this Freedom of Information Act (FOIA) case. Defendant cross appeals. We affirm.

Plaintiff claims that the trial court erred in denying his motion for trial, dismissing the bulk of his case, and subsequently granting defendant's motion for final judgment. (1) We disagree.

The primary reason the trial court denied the motion for trial and dismissed plaintiff's case is because he failed to make any progress on this side of the case. Defendant made a significant amount of information available to plaintiff. According to defendant's response, this material was everything plaintiff asked for except the absentee ballots and the ballot jackets. Despite over a year and a half passing, plaintiff never bothered to look at the material and determine what materials were provided. Dismissal of a suit for want of prosecution is a question left to the sound discretion of the trial court. "Appellate review is restricted to determining whether the is any justification in the

1 The central issue of the case is whether certain absentee ballots and ballot jackets can be released by defendant pursuant to plaintiff's FOIA request. The trial court dealt with this issue in a motion for judicial guidance brought by defendant. The second issue involves the release of collateral material to the ballots sought in the FOIA request. It is the second issue that the court dismissed. The court dismissed plaintiff's case on all issues except those dealt with in the motion for judicial guidance.

Record for the trial court's ruling." *Eliason Corp, Inc v Dept of Labor,* 133 Mich App 200, 203; 348 nw2D 315 (1984). Given these facts, justification existed for the trial court' ruling, and the trial court did not abuse its discretion in dismissing plaintiff's claim.

Further, dismissal was appropriate in light of a previous court order that directed defendant to issue a new response to plaintiff's FOIA request. The order also indicated that if plaintiff was not satisfied with this response, he was to amend his complaint removing defendant as a party and replacing her with the City of Southfield. Plaintiff failed to amend his complaint as mandated by this order. Although the trial court waited longer than the time allotted by the order, the dismissal was still proper and consistent with the order. Therefore, the trial court did not abuse its discretion in dismissing plaintiff's claims and subsequently did not err in denying plaintiff's motion for trial and granting defendant's motion for final judgment.

Next, plaintiff claims that the trial court erred in denying his motion to show cause why defendant should not be held in contempt of court. We disagree. The decision whether to issue an order of contempt is left to the sound discretion of the trial court and is reviewed for an abuse of discretion. Schoensee v Bennett, 228 Mich App 305, 316; 577 NW2d 915 (1998).

Plaintiff brought the show cause motion alleging defendant had violated a court order prohibiting the destruction of the absentee ballots and ballot jackets at issue in this case. MCR 3.606 governs the initiation of contempt proceedings for occurrences outside the immediate presence of the court and provides that proceedings can only be initiated "on a proper showing on ex parte motion

supported by affidavits." MCR 3.606. MCR 2.119(B) requires affidavits to be made on personal knowledge and state with particularity facts admissible as evidence. The material offered by plaintiff was not sufficient since it was not based on personal knowledge and was likely inadmissible double hearsay. Therefore, the trial court did not abuse its discretion with regard to the contempt proceedings. See Schoensee, supra.

Plaintiff next claims that the trial court's ruling that the absentee ballot jackets were exempt from disclosure under the FOIA was erroneous. We disagree. Whether a public record is exempt from disclosure pursuant to the FOIA is a question of law reviewed de novo. Larry S Baker PC v Westland, 245 Mich App 90, 93; 627 NW2d 27 (2001).

MCL 15.243(1) states, in pertinent part:

A public body may exempt from disclosure as a public record under this act:

(a) Information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

Thus there is a two-part analysis; first, whether the information would be personal in nature and, second, whether disclosure of it is a clearly unwarranted invasion of an individual's privacy. Larry S Baker PC, supra, at 94. Information is personal in nature if it reveals intimate or embarrassing details of an individual's private life. Id. at 95. The information contained on the ballot jackets themselves does not seem to rise to the level of intimate or embarrassing since it merely includes the voter's name, address, signature, and the signature of any person who assisted him or her—not embarrassing or intimate facts. And defendant does not content otherwise.

But this Court cannot consider the information contained on the ballot jackets in isolation, we must also consider release of the ballots. The Michigan Constitution, Const 1963, art 2, sec 4, guarantees the right to a secret ballot in all elections. Such a right cannot be abrogated absent a showing that the voter acted fraudulently.

Schellenberg v Rochester Lodge No 2225 of the Benevolent & Protective Order of Elks, 228 Mich App 20, 29; 577 NW2d 163 (1998), quoting Belcher v Ann Arbor Mayor, 402 Mich 132, 134; 262 NW2d 1 (1978). How a person voted is certainly intimate; therefore, the information qualifies under the first prong of the test. In fact, release of the person's name along with their ballot and vote may be unconstitutional in the State of Michigan. Const 1963, art 2, sec 4; Schellenberg, supra.

In evaluating whether information falls within the second part of the exemption, this Court must balance the public interest in disclosure against the interest the Legislature intended the exemption to protect. Kocher v Dep't of Treasury, 241 Mich App 378, 382; 615 NW2d 767 (2000). The only relevant public interest in disclosure that this Court may weigh is the extent to which disclosure would contribute to the public understanding of the operations and activities of government (which is the core purpose of FOIA). Id., quoting United States Dep't of Defense v Federal Labor Relations Authority, 510 US 487, 495; 114 S Ct 1006; 127 L Ed 2d 325 (1994). This important purpose "is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct." Kocher, supra, quoting Mager v Dep't of State Police, 460 Mich 134, 144-146; 595 NW2d 142 (1999). In the typical case where one private citizen is attempting to discover information about another private citizen through the FOIA, the requestor is not truly seeking to shed light on the agency's activities. Kocher, supra (further citation omitted).

Plaintiff's inquiry seems to be an attempt to obtain personal information on third parties and not a proper inquest to shed light on governmental activities. This Court has stated that such an attempt is improper. Id. at 382-383. The disclosure of this information would constitute an unwarranted invasion of an individual's privacy. Id. Although the ballot jacket information absent the voting record may not fall within the exemption to the FOIA, the release of the information with the individual's vote, as plaintiff requested, would fall within the exemption. The trial court dealt with this issue by limiting the access to one of the two items. The trial court's decision is not contrary to MCL 15.243 (1)(a). We find no error in this solution to the potential problem.

Finally, plaintiff claims that the trial court's decision to dismiss and not release the ballot jackets is contrary to Michigan Election Law. Specifically, plaintiff claims that defendant has violated MCL 168.760 and 168.931(1)(h) by not turning over the information. First, MCL 168.760 does not require defendant to turn over the absentee ballot jackets as plaintiff claims. It merely requires defendant to keep a list of absentee ballot applications and such things as the date the ballot was received. Plaintiff does not contend that defendant refused him access to such a list. Therefore, MCL 168.760 does not apply to this case.

Next, MCL 168.931(1)(h) states:

A person shall not willfully fail to perform a duty imposed upon that person by this act, or disobey a lawful instruction or order of the secretary of state as chief state election officer or of a board of county election commissioners, board of city election commissioners, or board of inspectors of election.

There is no contention that defendant disobeyed an instruction of any of the individuals listed in the statute. Plaintiff only claims that defendant failed to perform a duty under the act by not turning over the ballot jackets. But as concluded above, the trial court's decision was not erroneous. Therefore, defendant did not fail to perform a duty and MCL 168.931(1)(h) does not apply.

Plaintiff asserts on appeal that if the ballots and the ballot jackets cannot be released together, he would prefer the ballot jackets rather than the ballots. Plaintiff did not raise this issue below and did not ask for such relief from the trial court. This Court need not address an issue raised for the first time on appeal, as it is not properly preserved for appellate review. FMB-First Nat'l Bank v Bailey, 232 Mich App 711, 718; 591 NW2d 676 (1998).

Defendant raises two issues on cross appeal, both related to the trial court's ruling in its order of judicial guidance that the absentee ballots, in an of themselves and not in conjunction with the ballot jackets, are not exempt from disclosure under the FOIA. First, defendant contends that the ballots are exempt from disclosure pursuant to MCL 15.243(1)(d). We disagree.

MCL 15.243(1)(d) states:

(1) A public body may exempt from disclosure as a public record under this act any of the following:

***

(d) Records or information specifically described and exempted from disclosure by statute.

Defendant first cites MCL 168.764a(5), which states that it is a violation of election law for a person other than the absent voter to be in possession of a voted or un-voted absent voter ballot. Defendant also cites MCL 168.932(f), which makes it a felony for anyone other than the absent voter to "Possess an absent voter ballot mailed or delivered to another person, regardless of whether the ballot has been voted." The parties dispute whether plaintiff's review of the ballots would constitute possession.

Possession is not defined in either statute. The primary task in statutory construction is to give effect to the Legislature's intent. This Court achieves this purpose by applying the plain and unambiguous meaning of the words of the statute as written. Staton v Battle Creek, 466 Mich 611, 615; 647 NW2d 508 (2002). Consulting a dictionary is appropriate in determining the plain or ordinary meaning of a word. Id. at 617. Random House Webster's College Dictionary (1997) defines "possess" as: "to have as belonging to one; have as property; own." Although plaintiff will have the ballots or a copy of them in his hands, inspection under the FOIA does not seem to connote actual possession of the ballots. Plaintiff will not have ownership, dominion, or control over the ballots. He will merely be allowed to inspect them. Therefore, releasing the ballots would not violate the plain language of MCL 168.764a(5) or MCL 168.932(f).

Defendant next cites MCL 168.932(e)(i) which makes it a felony for a person not involved in the counting of ballots, and who has possession of an absent voter ballot mailed or delivered to another person, to open the envelope containing the ballot. Again, this statute uses the term possession and, as discussed above, plaintiff's inspection does not equate to possession of the ballots. Further, plaintiff would not be required to open the envelopes as discussed in the statute. In fact, the court's ruling that the ballot jackets were exempt would require defendant to open the envelopes and remove

the ballots in order for plaintiff to inspect them. Defendant does not deny that she is a person involved in the counting of ballots. Therefore, turning over the ballots independent of the ballot jackets would not violate MCL 168.932(3)(i).

Defendant also cites MCL 168.932(d), which states:

A person shall neither disclose to any other person the name of any candidate voted for by any elector, the contents of whose ballots were seen by the person, nor in any manner obstruct or attempt to obstruct any elector in the exercise of his or her duties as an elector under this act.

Defendant's argument implies that she will have to violate this statute if she turns over the ballots. We disagree. Defendant will not have to disclose the name of a candidate voted for by any elector/voter because the voter's name will remain secret. Defendant will not be informing plaintiff or anyone else whom an individual voter voted for as contemplated by the statute. But she will simply be turning over the ballots without the voter names. The statute does not cover this situation. To hold otherwise would mean that a person would be guilty of a felony for saying to another person the name of any candidate who received a vote. This interpretation would be absurd. Statutes are construed in harmony with the spirit or intent of the statute. This Court will avoid interpretations that lead to absurd or unreasonable results. Fletcher v Fletcher, 447 Mich 871, 880; 526 NW2d 889 (1994). Disclosure of the ballots is not contrary to MCL 168.932(d) unless such an absurd result is reached.

Finally, defendant claims that the ballots are exempt pursuant to MCL 15.243(1)(a). We disagree. As stated above, the threshold question is whether the information falls within the "personal" privacy exemption. Larry S Baker PC, supra at 94. Information is personal in nature if it reveals intimate or embarrassing details of an individual's private life. Id. Here, if the ballot were released with the voter's name, the information would be personal in nature. But separating the ballot from the ballot jacket would alleviate the privacy concerns. The ballots would only reveal the names of the candidate voted for and the office for which he or she ran, not the name of the voter. Thus, no matter the circumstance, each

voter's vote would remain secret. There would be no chance of voter intimidation or reprisal because the individual voters would remain anonymous; thus, such information should be released. See id. The trial court correctly ruled that the ballots separated from the ballot jackets were not exempt from disclosure under FOIA.

Affirmed.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

APPENDIX D

DECISION OF THE OAKLAND COUNTY CIRCUIT COURT
DATED OCTOBER 3, 2003

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

STEPHEN P. KORN,

Plaintiff,

-v- Case Number 2001-035929 CZ
Honorable Nanci J. Grant

NANCY BANKS, in her official capacity as
Clerk for the City of Southfield, Michigan

Defendant.

_____/

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ORDER AND OPINION

At a session of said Court, held in the Courthouse in the City of Pontiac, County of Oakland, State of Michigan on the 3rd day of October, 2003

PRESENT: THE HONORABLE NANCI J. GRANT,
CIRCUIT JUDGE

This matter comes before the Court on Plaintiff's motion for trial and on Defendant's motion for confirmation of final order. For the following reasons, Plaintiff's motion is denied and Defendant's motion is granted

This case arises out of a dispute over the results of a November 1999 election in the City of Southfield. One of the unsuccessful candidates discovered that the City had received 180 absentee ballots on election day, but had not opened or counted them because they arrived after the polls had closed. Thus, the candidate filed suit seeking an order compelling the votes to be considered in the election. That suit was dismissed and that ruling was affirmed on appeal.

Sometime thereafter, Stephen Korn filed a request with the City pursuant to the Freedom of Information Act (FOIA) seeking, among other things, to examine "all absentee ballots" cast in the November 1999 election. In particular, Plaintiff sought to examine both the ballots themselves and the ballot jackets that identify the voter. The City provided some information, but refused to let him examine the uncounted absentee ballots. Thus, Plaintiff filed the current action seeking relief under FOIA.

The City provided some materials pursuant to the request, but did not turn over or allow Plaintiff to inspect the unopened absentee ballots. Instead, the City filed a "motion for judicial guidance" regarding the absentee ballots, seeking a ruling that Defendant was not entitled to the ballots. The Court granted the motion in part in August 2002. Specifically, the Court ruled that Plaintiff was entitled to see the ballots themselves, but was not entitled not see the ballot jackets that contain voter information.

In so ruling, however, the Court noted that Plaintiff's entitlement to the documents was a close question and the ruling was likely to be appealed. Moreover, once relief was granted, it could not be "undone" in the event that the Court's ruling is reversed. Thus, the Court declined to enforce the award until the issues were addressed on appeal.

Several months after this ruling the parties filed the current motions. The issue in these motions is whether Plaintiff is entitled to a trial to pursue other information sought in his FOIA request. The City argues that the Court's ruling on the "motion for judicial

guidance" resolved all issues and, therefore, the case should be closed. Plaintiff, on the other hand, identifies the following issues for trial:

1. What documents are there for production
2. What documents were destroyed and the circumstances surrounding the destruction of documents;
3. The preservation of the documents, absentee ballots and absentee ballot jackets until such time as the Appellate Court can rule upon the request of Plaintiff to review the disputed absentee ballots and absentee jackets;
4. A procedure to review the authenticity of the disputed unopened, uncounted absentee ballots and their jackets;
5. A procedure to review the public records;
6. Statutory attorney fees.

The Court cannot accept the City's assertion that the ruling on the "motion for judicial guidance" addressed all claims raised in this action. The motion, after all, did not seek summary disposition, but rather addressed only the issue of the ballots. At the same time, however, the Court also notes that the ballots are by far the most important aspect of this case. Moreover, the issues that Plaintiff claims remain for trial are almost all dependent on the issue of the ballots. Finally, and most significantly, the Court notes that Plaintiff has not conducted discovery of any kind on the issues that he now claims remain for trial, despite the fact that the Court ruled on the motion for judicial guidance several months ago.

In this context, the Court finds that Plaintiff has waived his right to trial on any of the foregoing issues, at least prior to a ruling on the issues in the motion for judicial guidance. Thus, the Court shall grant the City's motion for confirmation of final order, and dismiss the remaining portions of Plaintiff's claim. The dismissal, however, is without prejudice, and may be raised again in the event that Plaintiff prevails on appeal.

Finally, the Court denies Plaintiff's request that Defendant Banks be held in contempt, as there is no indication that she has violated any court order.

The City's motion is granted and the case is dismissed.

NANCI J. GRANT, Circuit Judge

APPENDIX E

LETTER TO THE SOUTHFIELD CITY CLERK SEEKING ELECTION INFORMATION DATED OCTOBER 19, 2001

On October 19, 2001, Plaintiff/Appellant wrote to Defendant Appellee:

"Re: Freedom of Information Request;

Dear Ms. Banks,

"This letter is written to request that the records and documents associated with the November 2, 1999 election be made available for my inspection. I am particularly interested in all absentee ballots, which were cast in that election; the ones, which were counted; and the ones that were not counted. In addition, I would like to review all records and data associated with the conduct of this election by your office. What applications for absentee ballots went out? What requests for absentee ballots came back? What absentee ballots went out. What absentee ballots came back. Copies of this information may be requested.

According to the letter of the Michigan Department of State of September 21, 2001, which was sent to your office, this information is public information:

"In closing, it merits note that the records and documents associated with the election are on public record and available for your inspection at your request."

I am sending this request personally, and not on behalf of Councilman Sidney Lantz. Please let me know in writing what the position of your office is relative to this request."

Very truly yours,

Stephen P. Korn

SPK/ma"
(Exhibit I from Plaintiff's Complaint)

APPENDIX F

LETTER FROM THE SOUTHFIELD CITY CLERK DENYING ALL ELECTION INFORMATION DATED OCTOBER 31, 2001

On October 31, 2001, Defendant/Appellee wrote to Plaintiff/ Appellant:

"Re: Freedom of Information Request;

Dear Mr. Korn:

The City of Southfield has received your request to inspect and copy public records associated with the November 2, 1999 election. Specifically, you stated:

> I am particularly interested in all absentee ballots, which were cast in that election; the ones, which were counted; and the ones that were not counted. In addition, I would like to review all records and data associated with the conduct of this election by your office. What applications for absentee ballots went out? What requests for absentee ballots came back? What absentee ballots went out? What absentee ballots came back?

Your request to inspect and copy public records has been carefully reviewed. Please be advised that your request is denied.

Many of the records that you requested to inspect do not exist. All ballots from the 1999 election have been disposed of in accordance with state law with the exception of the absentee ballots that were received after the polls closed on November 2, 1999.

As you are aware, these absentee ballots are the same ballots that the subject of litigation that you have brought on behalf of your client, Mr. Lantz. (Sidney Lantz-vs- Southfield City Clerk, Oakland County Circuit Court case number 1999-019368-AW). The records you have requested to inspect and copy are records or information related to a civil action in which the requesting party and the public body are parties. These records are exempt from disclosure under the Freedom of Information Act. [MCL 15.243 (1)(v)]

In addition, records you have requested to inspect and copy are exempt from disclosure under the Freedom of Information Act for the following reasons:

Information included in these records is of a personal nature, and public disclosure of the information would constitute a clearly

unwarranted invasion of an individual's privacy.
[MCL 15.243(1)(a)]

Information included in these records is specifically described and exempted from disclosure by statute, to wit: the Election Code. [MCL 15.243(1)(D)]

You have a right to seek review of this denial. As required by the Freedom of Information Act, a written explanation of that right is enclosed with this letter.

Sincerely,
Nancy L. M. Banks
Freedom of Information Coordinator
City of Southfield"

(Exhibit II from Plaintiff's Complaint)

APPENDIX G

SECOND AMENDED INFORMATION

THE PEOPLE OF THE STATE OF MICHIGAN
V
WILLIE CARL JENKINS, SR.

SECOND AMENDED INFORMATION

THE PEOPLE OF THE STATE OF MICHIGAN
V **DC #97-5442-FY**
WILLIE CARL JENKINS, SR. **CC#98-015030-FH**
CTN #96-98-000002-01

STATE OF MICHIGAN, COUNTY OF SAGINAW,

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: FRANK J. KELLEY, Attorney General of the State of Michigan, and Amy M. Ronayne, Assistant Attorney General, who prosecute for and on behalf of the People of the State of Michigan, appear before this Court and inform the Court that on the date and at the location described, the defendant:

COUNT I

OBSTRUCTION OF JUSTICE

One Willie Carl Jenkins, Sr. late of the County of Saginaw, State of Michigan, did, on October 31, 1996, in the County of Saginaw, State of Michigan, commit the crime of Obstruction of Justice by knowingly participating in fabricating false, inaccurate or misleading evidence material to a grand jury investigation, to wit: by creating or assisting in creating a certificate of oath of office, dated July 9, 1996, reflecting the appointment of Robert Woods as deputy registrar/elections officer when such positions did not exist under Michigan law, after the grand jury requested to view said document, contrary to MCL 750.505; MSA 28.773 [750.505-A].

FELONY: 5 years and / or $10,000.00

COUNT II

CONSPIRACY

One Willie Carl Jenkins, Sr., late of the County of Saginaw, State of Michigan, did, on or about October 31, 1996, in the County of Saginaw, State of Michigan, unlawfully conspire.

combine, confederate and agree together with Maxine C. King to commit an offense prohibited by law, to wit: obstruction of justice; contrary to MCL 750.157a; MSA 28.354(1) [750.505-A] [C].

FELONY: 5 years and / or $10,000.00

COUNT III

ELECTION LAW-
APPOINTING CANDIDATE OR FAMILY MEMBERS TO RECEIVE ABSENTEE BALLOTS

One Willie Carl Jenkins, Sr., late of the County of Saginaw, State of Michigan, did, on or about July 19, 1996, in the County of Saginaw, State of Michigan, appoint Robert Woods as an assistant to accept delivery of absent voter ballots when he was a candidate and / or a member of the immediate family of James Woods, a candidate, appearing on the ballot for that election; contrary to MCL 168.764b and MCL 168.931; MSA 6.1764(2) and MSA 6.1931 [168.764B].

MISDEMEANOR: 90 days and / or $500.00

COUNT IV

ELECTION LAW – FAILURE TO PERFORM A DUTY

One Willie Carl Jenkins, Sr., late of the County of Saginaw, State of Michigan, did, or about August 5, 1996, in the County of Saginaw, State of Michigan, willfully fail to perform a duty imposed upon him by section 168.760 of the Michigan election law by refusing to allow public inspection of the absentee voter ballot applications and / or lists at all reasonable hours; contrary to MCL 168.931(1)(h); MSA 6.1931 [168.9311M].

MISDEMEANOR: 90 days and / or $500.00

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Amy M. Ronayne (P41113)
Assistant Attorney General
Criminal Division
PO Box 30218
Lansing, MI 48909
(517) 334-6010

Dated: May 1, 1998

APPENDIX H

FACTUAL BASIS FOR THE FAILURE TO PERFORM DUTY CHARGE IN COUNT FOUR OF THE SECOND AMENDED INFORMATION

THE PEOPLE OF THE STATE OF MICHIGAN
V
WILLIE CARL JENKINS, SR.

"On August 1, 1996, the Michigan State Police received a number of complaints about possible voter tampering in certain communities in Saginaw County, including Buena Vista Township. These complaints arose after more than two hundred envelopes and absent voter applications had been mailed from Lansing and received by the Saginaw City Clerk. The police department began a prompt investigation of the complaints because the primary election was to be held on August 6, 1996.

Detective Michael Hosh, Lieutenant Mark Dougovito, and Lieutenant Charles Bush arrived at the Buena Vista Township Clerk's Office on August 5, 1996, to investigate the complaints, but **defendant refused to permit the officers to review voting records for the township involving absentee ballot applications and the absentee poll book containing the records of applications that had been mailed for the current primary election.1....**

1. Defendant's refusal to allow inspection of the records was the basis for the failure to perform duty charge in count IV."

People v. Jenkins, 624 NW2d 457 at 459 (2000).

APPENDIX I

FACTUAL BASIS FOR THE OBSTRUCTION OF JUSTICE CHARGE IN COUNT ONE OF THE SECOND AMENDED INFORMATION

THE PEOPLE OF THE STATE OF MICHIGAN
V
WILLIE CARL JENKINS, SR.

"The evidence in this case showed that defendant [Willie Jenkins] created or assisted in the creation of a false, inaccurate, and misleading document that was material to a grand jury investigation.....

.....We conclude that the knowing assistance in fabricating false and fraudulent documents for presentation to a grand jury, with the intent to impede, thwart, or interfere with the administration of justice, constitutes obstruction of justice. Likewise, one who agrees, understands, plans, designs, or schemes to commit acts that obstructed or were intended to obstruct the administration of law engages in conspiracy to commit obstruction of justice. See People v. Ormsby, 310 Mich 291, 300, 17 NW2d 187 (1945). See also United States v. Mullins, supra (obstruction of justice was proved by evidence that defendant induced certain police officers to alter other officers' flight log, creating false and fraudulent entries, and then producing the altered flight logs in response to a grand jury subpoena issued in connection with a federal grand jury investigation); United States v. Siegel, supra at 531-532 (fabrication of false memoranda and swearing that the documents provided were complete records constituted obstruction of justice and perjury).

Accordingly, we conclude that defendant's [Willie Jenkin's] conduct in this case falls within the category of offenses that comprise common-law obstruction of justice, and the circuit court did not err in denying defendant's motion to quash the charges of obstruction of justice and conspiracy."

People v. Jenkins, 624 NW2d 457 at 465 and 466 (2000).

APPENDIX J

SENTENCE OF MR. WILLIE JENKINS

THE PEOPLE OF THE STATE OF MICHIGAN
V
WILLIE CARL JENKINS, SR.

"....The trial court then made the following remarks before imposing sentence:

The Court will say that this is a difficult case, because this is a defendant standing before the Court, Mr. Jenkins, who has a very good background, and who has, at times, served as a model to not only the youth of the community, but many adults, and who was entrusted with a significant amount of responsibility and trust, both as a teacher, coach, and ultimately an elected public official, and a clerk of Buena Vista Township, and who has, for whatever reason, violated that trust in a significant way.

The lesson to be imparted today is that the law will not tolerate tampering with the ballot box, including how people get their absentee ballots into that ballot box or otherwise, or obstructing the justice system. Our right to vote and our justice system are two of the cornerstones of our democracy and our precious freedom, and they so importantly distinguish and characterize our form of government.

To punish the defendant and to deter others from similar conduct, the Court imposes the following sentence. On Counts I and II, obstruction of justice and conspiracy, it is the sentence of the Court that the defendant [Willie Jenkins] be committed to the jurisdiction of the Michigan Department of Corrections and thereafter placed in an appropriate state penal institution. The Court fixes the minimum terms in Counts I and II, in my discretion, at 15 months, the maximum is set by law at five years, and I fix it in each count at five years.

We conclude that there was ample justification for the sentence imposed. The trial court properly considered defendant's [Willie Jenkins'] background, his service to the community, and his position as an elected township official who was granted the trust of his community, but violated that trust by committing the instant offenses. Defendant's [Willie Jenkins'] fifteen-month minimum sentences were proportionate to the offense and the offender and did not constitute an abuse of discretion. Milbourn, supra.

Affirmed."

People v. Jenkins, 624 NW2d 457 at 468 and 469 (2000).

[*All Election Records were ultimately produced, including the unopened, uncounted absentee ballots. The unopened, uncounted absentee ballots were opened in conjunction with the Michigan Department of Elections, utilizing a process to insure the privacy and integrity of each and every vote. The process involved the opening of the envelopes by one group, and a second group then evaluating the actual ballots].

*Lieutenant Detective Michael Hosh of the Michigan State Police

No. 05-476

In The Supreme Court of the United States

STEPHEN P. KORN,

Petitioner,

vs.

NANCY BANKS, IN HER OFFICIAL CAPACITY AS CLERK FOR THE CITY OF SOUTHFIELD,

Respondent.

On Petition For A Writ Of *Certiorari* To The Court Of Appeals For The State Of Michigan

RESPONSE TO PETITION FOR WRIT OF *CERTIORARI*

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Should the United States Supreme Court review a decision of a state's intermediate appellate court to affirm a state trial court's decision to summarily dismiss a plaintiff's state-based freedom of information lawsuit, when the information sought by the plaintiff would have revealed both the identity of a voter and how he or she had voted in a particular election?

LIST OF PARTIES

All parties in the action appear in the caption of the case on the cover page.

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TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CITATIONS OF OPINIONS AND ORDERS

October 3, 2003 Opinion and Order of the Honorable Nanci J. Grant, Circuit Judge, in *Stephen P. Korn v. Nancy Banks, in her official capacity as Clerk for the City of Southfield*, Oakland County Circuit Court (Michigan) Civil Action No. 2001-035929 CZ (unreported)

July 27, 2004 decision and opinion of the Michigan Court of Appeals in *Stephen P. Korn v. Nancy Banks, in her official capacity as Clerk for the City of Southfield, Michigan*, Court of Appeals No. 251827, *rel'd* 7/27/04 (unpublished)

February 28, 2005 Order of the Michigan Supreme Court in *Stephen P. Korn v. Nancy Banks, in her official capacity as Clerk for the City of Southfield, Michigan*, Supreme Court No. 126818, *rel'd* 2/28/05, 472 Mich. 867, 692 N.W.2d 839 (2005)

July 8, 2005 Order of the Michigan Supreme Court in *Stephen P. Korn v. Nancy Banks, in her official capacity as Clerk for the City of Southfield, Michigan*, Supreme Court No. 126818, *rel'd* 7/8/05, 473 Mich. 856, 699 N.W.2d 301 (2005)

STATEMENT OF JURISDICTION

Inasmuch as Petitioner did not raise any federal constitutional or statutory issues in the courts of the State of Michigan (*i.e.*, the Oakland County Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court) in the above-entitled cause of action, the Respondent, Ms. Banks, would respectfully suggest that this Honorable United States Supreme Court has no jurisdiction over the instant matter because the sole federal question raised in Petitioner's Petition for a Writ of *Certiorari*, whether or not there has been a denial of equal protection under the 14th Amendment of the United States Constitution, was *not* raised in Michigan's state courts. *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S. Ct. 1161, 22 L. Ed. 2d 398 (1969); see also the Judiciary Act of

1789, 1 Stat. 85, § 25, and *Crowell v. Randell*, 35 U.S. 368, 393-399, 9 L. Ed. 458 (1836).

CONSTITUTIONAL PROVISION

Ms. Banks acknowledges that Petitioner cites the 14th Amendment to the United States Constitution as being at issue. The 14th Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ms. Banks respectfully denies that the 14th Amendment has any application whatsoever to the issue of whether Petitioner's lawsuit against her should have been dismissed by the trial court, the Oakland County Circuit Court of the State of Michigan, for lack of prosecution when Petitioner failed to make any discovery for more than a year after being authorized to do so by the trial court.

INTRODUCTION

This litigation arises from a 1999 local government election in Michigan, in which one Sidney Lantz (hereinafter Mr. Lantz) won a two-year term to a city council. Had Mr. Lantz received more votes, he could have won a four-year term instead of a two-year term on the council[1]. Mr. Lantz filed suit against the city's clerk, Nancy Banks (Ms. Banks or Respondent), seeking access to certain information concerning the 1999 local election and the counting of

---

[1] Mr. Lantz was re-elected to a second two-year term in 2001, finally winning a four-year term in 2003. His present term expires in 2007.

absentee ballots in that election. That suit was dismissed with prejudice by the trial court. The dismissal was affirmed on appeal. *Sidney Lantz v. Southfield City Clerk*, 245 Mich. App. 621, 628 N.W.2d 583 (2001), *lv. den.*, 465 Mich. 867, 634 N.W.2d 352 (2001), *cert. den.*, 534 U.S. 1080, 122 S. Ct. 811, 151 L. Ed. 2d 696 (2002)[1].

While Mr. Lantz was pursuing his case (ultimately, to no avail), his attorney, Petitioner in the case at bar, filed his own lawsuit against Ms. Banks under the Michigan Freedom of Information Act (MFOIA), MCL § 15.241 *et seq.*, P.A. 1976, No. 442. For all intents and purposes, Petitioner sought the same absentee ballot information in the 2001 case (that is, the matter currently before the United States Supreme Court) that Mr. Lantz sought in the 1999 case. The trial court dismissed Petitioner's case for lack of prosecution, albeit without prejudice. The Michigan Court of Appeals affirmed the dismissal, pointedly noting Petitioner's failure to pursue the case. *Stephen P. Korn v. Southfield City Clerk*, Michigan Court of Appeals No. 251827, *rel'd*, 7/27/2004 (unpublished), *lv. den.*, 472 Mich. 867, 692 N.W.2d 839 (2005), *recon. den.*, 473 Mich. 856, 699 N.W.2d 301 (2005).

Petitioner now claims an equal protection violation by all Michigan courts in the dismissal of his cause of action. Petitioner maintains that the dismissal of his case against a white female local government clerk is inconsistent with the decision of the Michigan Court of Appeals in *People v.*

---

[1] In its 2001 decision, the Michigan Court of Appeals held that absentee ballots had to be received by the responsible local election official before the close of the polls on election day to be counted, which is in accord with the applicable Michigan election statute, MCL § 168.764a. No absentee ballots were received by the local post office the day of the 1999 city council election, so the purported failure of the defendant in *Lantz* to call the post office and inquire about undelivered absentee ballots prior to the hour set for poll closing (*i.e.*, 8:00 P.M.) was meaningless. Finally, the *Lantz* plaintiff's request for production of "all" of the absentee ballots in the election was properly rejected by the trial, as it was not even marginally relevant to the issue of the *uncounted* absentee ballots.

Jenkins, 244 Mich. App. 1, 624 N.W.2d 457 (2000). *People v. Jenkins* affirmed the criminal conviction of a male, allegedly black, local government clerk for obstruction of justice, conspiracy to obstruct justice and violation of Michigan election laws, specifically MCL § 168.931 (allowing a candidate or relative of a candidate to accept absentee ballots) and MCL § 168.931(1)(h) (refusal to allow public inspection of absentee voter ballot applications and lists).

Petitioner did not raise the issue of equal protection in the Michigan trial court (the Oakland County Circuit Court), the Michigan Court of Appeals, or the Michigan Supreme Court, although Petitioner did cite *People v. Jenkins* for the general proposition that elected officials could be prosecuted for violating Michigan election laws. Petitioner is raising the issue of equal protection for the very first time in his Petition for a Writ of *Certiorari*. The United States Supreme Court will not review a federal constitutional issue presented in a Petition for a Writ of *Certiorari* from a state court unless that issue was previously presented to the state court. *Cardinale v. Louisiana*, *supra*, at 438, see also *Howell v. Mississippi*, ___ U.S. ___, 125 S. Ct. 856, 858-859, 160 L. Ed. 2d 873 (2005).

COUNTERSTATEMENT OF THE CASE

Ms. Banks must regretfully reject the "Statement of the Case" presented in Petitioner's Petition for a Writ of *Certiorari* in this matter, as it does not fairly present the material facts and proceedings in the case. Ms. Banks has therefore had no choice but to prepare the instant Counterstatement of the Case so the Honorable Justices of the United States Supreme Court will have a fair and balanced picture of the matter before them.

The City of Southfield is a first tier suburb of Detroit, Michigan. It has an elected City Council. As explained *supra*, Mr. Lantz was elected to a two-year term on the Council in November, 1999. Mr. Lantz, for reasons that remain unclear, believed uncounted absentee ballots would have moved him ahead of the candidate who won a four-year